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John Keeler SR.

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EXAMINER

CHAWLA, JYOTI

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.



***DETAILED ACTION***

Applicant's submission filed on 3/12/2010 has been entered as compliant. Claims 10 and 18 have been amended and claims 19-20 have been cancelled in this amendment. Claims 3-5, 7, 10, 12-13, 15 and 18 remain pending in and are examined in the application.

***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

**Rejection (A)**

Claims 3-5, 7, 10, 12-13, 15 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Doerter (US 5268189) in view of the combination of Peterson et al [J of Food Protection 8/1997, 60 (8), 928-934 (Abstract)], Byrd (US 2546428), Air Liquide Canada (RD 235012 Abstract only) and Sugisawa et al (US 4840805).

References and rejections are incorporated herein and as cited in the office action dated 9/15/2009.

Claims 19-20 have been cancelled.

Amendments to claim 10, recite a “sealed” flexible pouch and a volume of crabmeat or air “positioned in” said sealed flexible pouch

Amendments to claim 18, recite “sealing said flexible pouch to maintain said ambient air to crabmeat ratio within said flexible pouch”

Regarding the amendment to claim 10 and claim 18, Doerter teaches a process of treating and packaging fresh or cooked shellfish meat, such as crab, shrimp or lobster (Column 1, line 11 and lines 52-65), by packaging the shellfish meat (i.e., crabmeat) in a packaging container like a pouch (Column 2, lines 38-39); placing a volume of crabmeat into said packaging vessel (Column 2, lines 35-36) Since the surrounding air

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(ambient air) will enter the package when the package is open, Doerter teaches of placing a volume of air (i.e., ambient air) in the packaging container before sealing of the container after packing (Column 3, lines 11-16) and subsequently pasteurizing the sealed container (Column 3, lines 17-25) as instantly claimed, as addressed in the rejection in previous office action dated 9/15/2009.

The limitation of ambient air to crabmeat ratio of 13-20% by volume as previously claimed has been restated as “a volume of ambient air positioned in said sealed flexible pouch, said volume of ambient air providing an ambient air to crabmeat ratio within said sealed flexible pouch of about 13-20% by volume such that anaerobic bacterial growth is prevented” in amended claim 10 and the limitation of “sealing said flexible pouch to maintain ambient air to crabmeat ratio within said flexible pouch” in amended claim 18 (Emphasis added: emphasis denotes the amendments to previously recited claim). The above limitations have already been addressed in the previous office action over Doerter in view of the combination of Peterson, Byrd, Canada and Sugisawa (see office action of 9/15/2009, pages 5-7).

Thus, amendments to claim 10 and 18, are already disclosed by references and do not impart patentable distinction to claims.

Therefore, claims 3-5, 7, 10, 12-13, 15 and 18 are rejected as being unpatentable over Doerter in view of the combination of Peterson Byrd, Air Liquide Canada and Sugisawa.

## **Rejection (B)**

Claims 3-5, 7, 10, 12-13, 15, 18-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ueyama et al. (US 2002/0061412) in view of the combination of Peterson et al (J of Food Protection 8/1997, 60 (8), 928-934 (Abstract), Air Liquide Canada (RD 235012 Abstract only) and Sugisawa et al (US 4840805).

References and rejections are incorporated herein and as cited in the office action dated 9/15/2009.

Claims 19-20 have been cancelled.

Amendments to claim 10, recite a “sealed” flexible pouch and a volume of crabmeat or air “positioned in” said sealed flexible pouch

Amendments to claim 18, recite “sealing said flexible pouch to maintain said ambient air to crabmeat ratio within said flexible pouch”

Regarding the limitation of sealed pouch as recited in amended claims 10 and claim 18, Ueyama, teaches a heat shrinkable multilayer film (Page 1, paragraphs [0001] and [0002]) and packages made using the film for packaging for meats such as crabs, fish and other marine products (Page 5, paragraph [0066]). Ueyama also teaches packaging the desired product in a vessel, such as a bag or pouch (Page 1, paragraph [0002]) and placing a volume of the desired product in the packaging vessel and forming a casing; sealing the bag or package (page 7, paragraphs [0094] and [0099]); and heat treating or sterilizing said sealed packaging vessel (Page 3, paragraph [0039]) as instantly claimed and, as addressed in the rejection on page 9, paragraph 2 of previous office action of 9/15/2009.

The limitation of ambient air to crabmeat ratio of 13-20% by volume as previously claimed has been restated as “a volume of ambient air positioned in said sealed flexible pouch, said volume of ambient air providing an ambient air to crabmeat ratio within said sealed flexible pouch of about 13-20% by volume such that anaerobic bacterial growth is prevented” in amended claim 10 and the limitation of “sealing said flexible pouch to maintain ambient air to crabmeat ratio within said flexible pouch” in amended claim 18 (Emphasis added: emphasis denotes the amendments to previously recited claim). The above limitations have already been addressed in the previous office action over Ueyama, in view of the combination of Peterson, Air Liquide Canada and Sugisawa (see office action of 9/15/2009, on page 10 last paragraph to page 12).

Thus, amendments to claim 10 and 18, are already disclosed by references and do not impart patentable distinction to claims.

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Therefore, claims 3-5, 7, 10, 12-13, 15 and 18 are unpatentable over in view of the combination of Ueyama in view of the combination of Peterson, Air Liquide Canada and Sugisawa.

### **Rejection (C)**

Claims 3-5, 7, 10, 12-13, 15 and 18-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lett et al (GB2343611A), in view of the combination of Peterson et al (J of Food Protection 8/1997, 60 (8), 928-934 (Abstract), Air Liquide Canada (RD 235012 Abstract only), Doerter (US 5268189) and Sugisawa (US 4840805).

References and rejections are incorporated herein and as cited in the office action dated 9/15/2009.

Claims 19-20 have been cancelled.

Amendments to claim 10, recite a “sealed” flexible pouch and a volume of crabmeat or air “positioned in” said sealed flexible pouch

Amendments to claim 18, recite “sealing said flexible pouch to maintain said ambient air to crabmeat ratio within said flexible pouch”

Regarding the limitation of sealed pouch as recited in amended claims 10 and claim 18, Lett, teaches of packaging crabmeat in a flexible bags or vessels made from a 170 micron PA-PE having a tubular bottom and the bags are laminated and heat resistant up to a 190<sup>0</sup>C. Lett teaches of packaged crabmeat in brine and vacuum packaged (See page 3, lines 1-5), i.e., sealed package, as recited and, as addressed in the rejection on page 14, paragraph 2 and page 15, paragraph 2, lines 1-3 of previous office action of 9/15/2009.

The limitation of ambient air to crabmeat ratio of 13-20% by volume as previously claimed has been restated as “a volume of ambient air positioned in said sealed flexible

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pouch, said volume of ambient air providing an ambient air to crabmeat ratio within said sealed flexible pouch of about 13-20% by volume such that anaerobic bacterial growth is prevented” in amended claim 10 and the limitation of “sealing said flexible pouch to maintain ambient air to crabmeat ratio within said flexible pouch” in amended claim 18 (Emphasis added: emphasis denotes the amendments to previously recited claim). The above limitations have already been addressed in the previous office action over Lett in view of the combination of references Peterson, Air Liquide Canada, Doerter and Sugisawa (see office action of 9/15/2009, on pages 16 to 18).

Thus, amendments to claim 10 and 18, are already disclosed by references and do not impart patentable distinction to claims and claims 3-5, 7, 10, 12-13, 15 and 18 are unpatentable over Lett, in view of the combination of Peterson, Air Liquide Canada, Doerter and Sugisawa.

#### **Rejection (D)**

Claims 3-5, 7, 10, 12-13, 15 and 18-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Walker et al (US3852486) in view of the combination of Ueyama et al. (US 2002/0061412) and Sugisawa et al (US 4840805).

References and rejections are incorporated herein and as cited in the office action dated 9/15/2009.

Claims 19-20 have been cancelled.

Amendments to claim 10, recite a “sealed” flexible pouch and a volume of crabmeat or air “positioned in” said sealed flexible pouch

Amendments to claim 18, recite “sealing said flexible pouch to maintain said ambient air to crabmeat ratio within said flexible pouch”

Regarding the limitation of sealed pouch as recited in amended claims 10 and claim 18, Walker teaches a process of preserving shellfish meat, including crabmeat, by

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packaging and pasteurizing shellfish meat, such that the pasteurization is effective in destroying all the pathogenic bacteria and inhibit the growth of clostridium botulinum (which is an anaerobic bacteria) under conditions of mild refrigeration (Abstract, Column 2, lines 14-35). Walker teaches of pasteurization of the meat in such a way as to avoid recontamination. Walker also teaches of placing the meat in flexible plastic bags and seal by heat sealing (Column 4, line 39-68) as recited in claims 10, and 18 and, as addressed in the rejection on page 19, last 2 paragraphs of previous office action of 9/15/2009.

The limitation of ambient air to crabmeat ratio of 13-20% by volume as previously claimed has been restated as “a volume of ambient air positioned in said sealed flexible pouch, said volume of ambient air providing an ambient air to crabmeat ratio within said sealed flexible pouch of about 13-20% by volume such that anaerobic bacterial growth is prevented” in amended claim 10 and the limitation of “sealing said flexible pouch to maintain ambient air to crabmeat ratio within said flexible pouch” in amended claim 18 (Emphasis added: emphasis denotes the amendments to previously recited claim). The above limitations have already been addressed in the previous office action over Walker in view of the combination of references Ueyama and Sugisawa (see office action of 9/15/2009, on page 20, paragraph 3 to page 22, paragraph 1).

Thus, amendments to claim 10 and 18, are already disclosed by references and do not impart patentable distinction to claims and claims 3-5, 7, 10, 12-13, 15 and 18 are rejected as being unpatentable over Walker in view of the combination of Ueyama and Sugisawa.

### ***Response to Affidavit and Arguments***

Applicant's response filed 3/12/2010 and Declaration Under 35 USC 1.132 by John Keeler Jr. have been fully considered but they are not persuasive.



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With respect to the **commercial success** as stated in the declaration by Inventor John Keeler, Jr. of 3/12/2010 (Points 4-12, pages 2-3 of declaration) it is not clear if the claimed invention resulted in the commercial success or whether other factors contributed to the success, such as a change in marketing methods, competitive pricing, BLUE STAR brand increased focus on packaging in pouches as compared to another type of package, such as cans etc. "In considering evidence of commercial success, care should be taken to determine that the commercial success alleged is directly derived from the invention claimed, in a marketplace where the consumer is free to choose on the basis of objective principles, and that such success is not the result of heavy promotion or advertising, shift in advertising, consumption by purchasers normally tied to applicant or assignee, or other business events extraneous to the merits of the claimed invention, etc. (In re Mageli, 470 F.2d 1380, 176 USPQ 305 (CCPA 1973)).

Even if the commercial success argument was found convincing applicant's argument against other references not teaching Peterson is not convincing. Applicant argues that Peterson's packages lack advantages associated with applicants' invention. Applicant seems to arrive at this conclusion based on the reasoning that Peterson does not teach "sealing crabmeat and an ambient air in a flexible pouch at an ambient air-to-crabmeat ratio of about 13 to 20 percent by volume" (Declaration by John Keeler Jr. of 3/12/2010, page 4, lines 3-5). In response to applicant's above arguments against the references individually (i.e. Peterson reference individually), one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In the instant case, Peterson is not being relied upon to teach a package or a packaged product having "an ambient air to crabmeat ratio of about 13 to 20 percent by volume". Instead, Sugisawa reference is relied upon for this teaching. As addressed in the previous rejections and as pointed in the decision of Board of 7/6/2009, it is explained that Sugisawa's range of less than 25 volume% air (33% or less air: fish ratio) (col. 3, lines 10-11) encompasses the

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Appellant's range and, therefore, would render the Appellant's air contents prima facie obvious to one of ordinary skill in the art. Sugisawa's preferred range of less than 15 volume % air (18% or less air: fish ratio) (col. 3, line 11) overlaps the Applicants range. Use of amounts within the overlapping range would have been prima facie obvious to one of ordinary skill in the art at the time of the invention. See *In re Malagari*, 499 F.2d 1297, 1303 (CCPA 1974).

Further regarding Sugisawa not teaching the advantage of preventing development of anaerobic bacteria as claimed, as discussed in the previous office actions and as also pointed in the board decision that for a prima facie case of obviousness to be established, the applied prior art need not recognize a particular advantage recognized by the Appellant. See *Ex parte Obiaya*, 227 USPQ 58, 60 (BPAI 1985) ("The fact that appellant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious"). Moreover, L'Air Liquide or (Canada reference) would have indicated to one of ordinary skill in the art that Sugisawa's air provides the Appellant's recognized benefit of avoiding development of anaerobic spores (Appellant's Spec. q[ 10; L'Air Liquide p. 23512). The applicant is further referred to the rejections and response to arguments provided in the previous office action of 9/15/2009.

Applicants remarks of 3/12/2010 are directed to the affidavit and no new arguments are presented. Statements of the Declaration Under 35 USC 1.132 by John Keeler have not been found persuasive as discussed above and claims 3-5, 7, 10, 12-13, 15 and 18 remain rejected for reasons of record.

### **Conclusion**

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 8:30 am to 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/JC/  
Examiner  
Art Unit 1781

/Keith D. Hendricks/  
Supervisory Patent Examiner, Art Unit 1781